FILED
JUL 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Thomas J. Wilson
CITY ATTORNEY'S OFFICE
City of Tucson
P. O. Box 27210
Tucson, Arizona 85726
(602) 791-4104

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Thomas J. Wilson
CITY ATTORNEY'S OFFICE
City of Tucson
P. O. Box 27210
Tucson, Arizona 85726
(602) 791-4104

INDEX

	Page
Opinion Below.	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Question Presented	3
Statement	6
Argument	11
I. THE CAUSE OF ACTION IS MOOT. . . .	19
II. THE DECISION BELOW IS BASED EXCLUSIVELY ON NON-FEDERAL GROUNDS.	21
III. THERE IS NO SUBSTANTIAL QUESTION OF FEDERAL LAW.	27
Conclusion	33
Certificate of Service	34
Appendices:	
Appendix A - Tucson City Charter, chap. V, sec. 4	A-1
Appendix B - Tucson City Charter, chap IX, sec. 8	B-1
Appendix C - Rules and Regulations, Mayor and Council, City of Tucson, April 22, 1968, as amended July 14, 1968, and May 4, 1970, Division I, Reconsideration.	C-1

INDEX - Cont'd

	Page
Appendix D - Resolution 9503	D-1
Appendix E - Ordinance 4665	E-1
Appendix F - 17A, A.R.S., Special Actions, Rules of Procedure, rule 1(a). .	F-1
Appendix G - Prayer for Relief, Appellant's Complaint, Superior Court, in and for the County of Pima, Arizona, June 23, 1975	G-1
Appendix H - Arizona State Constitution, Article XIII, sec. 2.	H-1
Appendix I - Tucson City Charter, chap. V, sec. 2	I-1

TABLE OF CASES

	Page
Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969)	23
Alejandrino v. Quezon, 271 U.S. 528, 46 S.Ct. 600, 70 L.Ed. 1071 (1926)	21
City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968)	12
City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951)	5, 24
City of Tucson v. Walker, 60 Ariz. 232, 135 P.2d 223 (1943)	12
Durley v. Mayo, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956)	23
Equitable Life Assurance Co. v. Brown, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed. 190 (1902)	30
Kiekow v. Village of Chenequa, 342 F.Supp. 494 (1972)	23
Lane v. Hayes, 90 S.E.2d 270 (1955)	23
Maloney v. Condon, 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709 (1903)	21
Marbury v. Madison, 1 C. 137, 2 L.Ed. 60 (1803)	25
Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293	21
Norton v. Blaylock, 285 F.Supp. 659 (1968)	23

TABLE OF CASES - Cont'd

	Page
Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390, 72 S.Ct. 11, 96 L.Ed. 47 (1951)	32
Seaboard Airline R.Y. v. Padgett, 236 U.S. 668, 36 S.Ct. 481, 59 L.Ed. 777 (1915)	32
Security Mutual Life Ins. Co. v. Prewitt, 200 U.S 446, 26 S.Ct. 314, 50 L.Ed. 545 (1906)	21
State v. Norby, 165 P.2d 302 (1946)	23
Stewart v. Kansas City, 239 U.S. 14, 36 S.Ct. 15, 60 L.Ed. 120 (1915)	32
Strode v. Sullivan, 72 Ariz. 360, 236 P.2d 48 (1951)	12
U.S. v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321, 334 (1891)	17
Williamson v. Wannamaker, 48 S.E.2d 601 (1948)	21
Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922)	32

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

	Page
United States Constitution, Amendment XIV	4,27
Arizona State Constitution, Article XIII, sec. 2	12
Arizona Revised Statutes, Vol. 17A, Special Actions, Rules of Procedure rule 1(a)	10
Tucson City Charter	
Chap. V, sec. 2	13
Chap. V, sec. 4	3,7,13
Chap. IX, sec. 4	3,7,13
Chap. IX, sec. 8	2,13
Tucson City Ordinance 4665	9,20
Tucson City Resolution 9496	7,8,15, 16,19
Tucson City Resolution 9502	4,8,10, 16,18
Tucson City Resolution 9503	9,20
Rules and Regulations, Mayor and Council, City of Tucson, April 22, 1968, as amended July 14, 1968, and May 4, 1970, Division I, Reconsideration.	8

IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM, 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Council of the City of Tucson,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal in the above entitled matter be dismissed on the grounds that the cause is moot and that the judgment of the Arizona Supreme Court is based exclusively upon non-federal grounds.

In the alternative, the Appellees move that the judgment of the Arizona Supreme Court be affirmed on the ground that, if a federal question exists in this matter, the question is so unsubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the Arizona Supreme Court (App. A of Jurisdictional Statement) is reported at _____ Ariz. _____, 558 P.2d 686 (1976).

JURISDICTION

The jurisdictional requisites are set forth in the Appellant's jurisdictional statement. The Appellees, however, are unsure whether or not the matter is properly brought before the Court on appeal rather than certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Many of the pertinent provisions of the Tucson City Charter, the ordinances thereto and the rules and regulations governing the proceedings of the mayor and council of the City of Tucson are set forth in the Appellant's jurisdictional statement; however, the following provisions are also necessarily considered in any determination of this matter:

Tucson City Charter, chap. IX, sec. 8 (erroneously cited by Appellant

as: Tucson City Charter, chap. XI, sec. 8, Jurisdictional Statement, p. 7, but properly set forth therein).

Tucson City Charter, chap. V, sec. 4, provides:

> The city post auditor, city attorney, city clerk and city magistrate, hereinafter in this Charter designated "post auditor", "attorney", "clerk" and magistrate", respectively shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appointment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor.

Tucson City Charter, chap. IX, sec. 4, provides:

> The mayor and council shall establish rules for their proceedings and shall act only by resolution or ordinance.

QUESTION PRESENTED

The Appellant has alleged that the decision of the Arizona Supreme Court

raises three questions. The first question as asserted by the Appellant is whether or not resolution 9502 of the City of Tucson repealing the Appellant's appointment to the office of city magistrate denies him due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

The decision of the Arizona Supreme Court specifically did not address the efficacy or propriety of the mayor and council's action in passing resolution 9502. The Arizona Supreme Court determined that the passage of resolution 9502 was "unnecessary and mere surplusage." (Jurisdictional Statement, App. A at A-14) The Appellees, therefore, maintain that there can be no question as to the effect or propriety of resolution 9502.

A second question raised by the Appellant relates to the validity of an

emergency provision added to a resolution appointing a city magistrate which serves to make an action immediately effective. Once again the decision of the Arizona Supreme Court did not address the propriety of the addition of an emergency clause to a resolution of appointment. In fact, the Supreme Court's judgment reviewed its previous decision of City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951), and affirmed that decision stating that:

> ...the exercise of discretion by a city's legislative body in a determination of the existence of an emergency is outside the scope of review. We also note that since the repealer and emergency clause were surplusage, we need not consider this argument.
> (Jurisdictional Statement, App. A, A-15)

The Appellees, therefore, maintain that there can be no question before the Court relating to the imposition of an emergency clause upon a resolution of

appointment by the mayor and council of the City of Tucson.

The Appellees assert that the only question properly brought before the Court relates to the validity of the reconsideration of an appointment to the office of city magistrate by the mayor and council of the City of Tucson. The only question which the Appellees believe might be properly framed is: Does the mayor and council of the City of Tucson, pursuant to the Tucson City Charter, ordinances and the rules and regulations governing the conduct of their proceedings, possess the power to reconsider a resolution of appointment to the office of city magistrate and defeat it prior to its effective date?

STATEMENT

This litigation concerns the appointment of a magistrate to a position in the city court of the City of Tucson

by the mayor and council of the City of Tucson, Arizona. Prior to April 26, 1975, five magistrates occupied positions in the city court of the City of Tucson. On April 26, 1975, one of the magistrates submitted a letter of resignation from his position to be effective on May 2, 1975.

Responding to this resignation, the mayor and council, pursuant to their appointive authority, Tucson City Charter, chap. V, sec. 4 (set forth in App. A) considered on April 28, 1975, resolution 9496 proposing the appointment of the Appellant as a city magistrate. By a vote of four to two, one member being absent, resolution 9496 was passed, to be effective in thirty days. Tucson City Charter, chap. IX, sec. 8 (set forth in App. B).

On May 5, 1975, the mayor and council of the City of Tucson convened in regular session, all members present.

At this time, pursuant to Rule I of the Rules and Regulations adopted by the mayor and council to govern the conduct of their proceedings (set forth in App. C), one of the councilmen who had voted on the prevailing side of the motion adopting resolution 9496 moved to reconsider the resolution. Resolution 9496 was reconsidered and defeated by a vote of four to three.

In addition to having appropriately reconsidered resolution 9496, the mayor and council on May 5, 1975, also passed resolution 9502 which provided for the repeal of resolution 9496.

Resolution 9502 was not passed by a sufficient vote to make it immediately effective; however, on May 19, 1975, the next regular session of the mayor and council, resolution 9502 was reconsidered and passed and adopted by a vote sufficient to make it effective immediately.

By these two actions the mayor and council of the City of Tucson considered and rejected the Appellant as city magistrate of the City of Tucson.

On May 5, 1975, by resolution 9503 the mayor and council of the City of Tucson appointed Jean Williams to the position of city magistrate filling the position created by the resignation. This appointment was effective immediately for a term of office commencing May 6, 1975, to and including May 7, 1977 (resolution 9503 set forth in App. D).

Jean Williams served her entire term and held over as city magistrate of the City of Tucson until July 6, 1977, at which time her successor assumed the office with a term commencing on July 6, 1977, to and including July 5, 1979, as reflected in ordinance 4665 (set forth in App. E).

On or about June 10, 1975, the Appellant filed and served in the Superior

Court of the State of Arizona, in and for Pima County, a Complaint in Special Action and an Order to Show Cause why he should not assume the office of city magistrate. Under the rules of procedure in Arizona, all previously designated special writs have been unified in common action known as a special action through which relief in the nature of mandamus, prohibition, certiorari may be sought. 17A, A.R.S., Special Actions, Rules of Procedure, rule 1(a)(set forth in App. F). The Appellant in his complaint in the Superior Court sought relief in the nature of mandamus, seeking to have the court declare resolution 9502 "null and void and of no legal effect in that it is repugnant to and in violation of the City Charter of the Respondent, CITY OF TUCSON, and a violation of due process of law..." (Appellant's prayer for relief, Complaint in Special Action, Superior Court, Pima

County, Arizona, set forth in App. G).

On October 6, 1975, the Superior Court, in and for Pima County, granted the Appellant's prayer for relief. The Appellees appealed the Superior Court decision with the Arizona Supreme Court assuming jurisdiction. On November 29, 1976, the Arizona Supreme Court reversed the Superior Court's decision and denied a petition for rehearing on January 4, 1977.

ARGUMENT

The decision of the Arizona Supreme Court is clearly correct. Although the Appellant asserts that the case involves the questions of notice and due process, the singular issue is the authority possessed by the mayor and council of the City of Tucson in relation to their power to make appointments to the position of

magistrate of the city court of the City of Tucson.

Article XIII, sec. 2, of the Arizona State Constitution authorizes home rule charters for municipalities of a certain size (set forth in App. H). The fundamental purpose of this provision is to free such cities from state legislative control and invest in them sovereignty in all areas, especially those areas of municipal concern where the power to be exercised is specifically or impliedly granted by their charters. City of Tucson v. Walker, 60 Ariz. 232, 135 P.2d 223 (1943); accord, Strode v. Sullivan, 72 Ariz. 360, 236 P.2d 48 (1951). The organic law of the City of Tucson, therefore, is established by its city charter and the ordinances thereto. The City's governing body possesses those powers which are provided by charter and ordinances. City of Scottsdale v. Superior Court, 103 Ariz.

204, 439 P.2d 290 (1968). The Tucson City Charter has provided for the manner in which the mayor and council shall act in executing their legislative and executive duties.

Chap. IX, sec. 4, of the Tucson City Charter provides:

> The mayor and council shall establish rules for their proceedings and shall act only by resolution or ordinance.

The Tucson City Charter, chap. IX, sec. 8, provides in pertinent part that:

> ...No ordinance, resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace, health or safety of the city, but no such emergency measure shall become immediately operative unless it...shall be approved by an affirmative vote of five-sixths of the council.

Chapter V, sec. 2, of the Tucson City Charter designates the appointive officers of the city which includes magistrates of the city court (set forth

in App. I).

Tucson City Charter, chap. V, sec. 4, provides in relevant portion:

> The city..."magistrate",... shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appoinment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor.

Thus, the mayor and council, by specific provision of the Tucson City Charter, possess the authority to appoint city magistrates. Further, that authority has been extended to reserve to the council the absolute right of removal conditioned only by the requirement that, for removal to occur, there must be a two-thirds affirmative vote of the council.

The mayor and council executed a resolution, to be effective thirty days after its passage, appointing the Appellant to a position as city magistrate. In absolute compliance with the rules governing

its procedure, the mayor and council subsequently reconsidered the resolution and defeated it.

The Arizona Supreme Court, interpreting the power and authority of the mayor and council in relation to the Tucson City Charter, ordinances thereto and the rules and regulations promulgated by the mayor and council to govern its proceedings, held that the action taken by the mayor and council was appropriate. In reaching their decision the Arizona Supreme Court answered two questions. The first question was: What was the effective date of resolution 9496? The second question addressed was: Could the mayor and council reconsider and defeat resolution 9496?

The Arizona Supreme Court ruled that:

> All actions taken by the Tucson mayor and council do not become effective

> until thirty days after their passage unless accompanied by an emergency clause.
> (Jurisdictional Statement, App. A at A-11)

Resolution 9496 did not contain an emergency clause and thus was not effective immediately. The Arizona Supreme Court then reviewed the mayor and council's rules which govern their proceedings and determined:

> Since we have held that Mr. Jacobson's resolution of appointment was not effective for thirty days, the Tucson mayor and council had full authority to reconsider the appointment as they would any type of resolution.
> (Jurisdictional Statement, App. A at A-13)

The Arizona Supreme Court thus ruled that the act of reconsideration was appropriate and specifically did not addresss the mayor and council's additional action in repealing the resolution 9502, calling that act surplusage.

This Court has consistently held that the judiciary possesses a limited authority to review and adjudicate matters which relate to the rules which govern legislative proceedings. In this regard, the Court, in U. S. v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321, 334 (1891), stated:

> Neither do the advantages or disadvantages, the wisdom or folly, of...a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of methods are open to the determination of the house and no impeachment of the rule to say that some other way would be better, more accurate or even more just.

The Arizona Supreme Court sustained

in the mayor and council the unequivocal authority and power, established by the organic law of the City of Tucson, to reconsider a resolution of appointment. The Arizona Supreme Court decision, therefore, is a determination of the authority vested in the mayor and council of the City of Tucson. The judgment did not reach constitutional issues nor did it substantively consider, as the Appellant asserts, the repeal of resolution 9502.

The Appellant brought his action in special action before the Superior Court in and for the County of Pima, Arizona. That action sought relief by way of mandamus compelling the Appellees to swear the Appellant as a city magistrate. The action did not request relief as to damages nor assert any collateral claim.

The Appellant's appeal should be set aside for the reason that the matter

has now, by the passage of time, become moot; and for the further reason that, were the matter at this time not moot, the decision of the Arizona Supreme Court soundly rests on non-federal grounds. Additionally, the Appellees maintain that if a federal question lies in this litigation, it is so frivolous and unsubstantial so as to preclude review.

I

THE CAUSE OF ACTION IS MOOT.

The passage of time has rendered any cause of action which might be brought before the Court moot. Resolution 9496 would have established a term of office for the Appellant commencing April 29, 1975, to and including April 28, 1977. The Appellant's appointment was, however, denied; and another party was appointed to the position in the city court with a term of office commencing on May 6,

1975, to and including May 5, 1977 (see resolution 9503, App. D). That appointee, Jean Williams, served that term of office and held over until July 6, 1977, whereupon her successor duly appointed by the mayor and council of the City of Tucson assumed the office (see ordinance 4665, App. E).

The mere lapse of time has brought about the expiration of the subject matter of this suit. The original proceeding in this matter was one seeking an order in the nature of a writ of mandamus compelling the Appellees to allow the Appellant to be sworn as a city magistrate. There is no ability for the Court, at this time, to grant any effective relief. The term of office which the Appellant sought has expired. Another party effectively served that term of office, and a successor has been appointed in relation to that position in the city court. There simply

is no longer a term of office to which to restore the Appellant. Such a passage of time unquestionably renders this matter moot. Alejandrino v. Quezon, 271 U.S. 528, 46 S.Ct. 600, 70 L.Ed. 1071 (1926); Maloney v. Condon, 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709 (1903); Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed 293 (1895); cf. Security Mutual Life Ins. Co. v. Prewitt, 200 U.S. 446, 26 S.Ct. 314, 50 L.Ed. 545 (1906).

II

THE DECISION BELOW IS BASED EXCLUSIVELY ON NON-FEDERAL GROUNDS.

The Supreme Court of Arizona based its decision in this matter upon the interpretation of the authority and power vested in the mayor and council of the City of Tucson to reconsider an appointment to the office of city magistrate. In that relation the Court considered

the matter of the appointing authority, the office to which the appointment was to be made and the effect of the executive action taken to effect such an appointment. The Court soundly based its decision upon precedence in the Arizona law and upon the interpretation and analysis of the actions of the mayor and council of the City of Tucson.

The Arizona Supreme Court did not address a federal issue, but founded its decision upon its determination that the power and authority to act as the mayor and council of the City of Tucson acted clearly exist by provisions of the Tucson City Charter, the Tucson City ordinances and the rules and regulations promulgated by the mayor and council to govern its proceedings. The Appellant has not shown that the decision is not firmly based upon appropriate state grounds as is necessary in order to invoke the jurisdiction of

the Court. Durley v. Mayo, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956).

Furthermore, the grounds upon which the Arizona Supreme Court based its decision are certainly broad enough to sustain its judgment. The Arizona Supreme Court has previously held it to be the rule in Arizona that a public office does not create a property or contract right in the holder. Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969). Such a rule has been similarly recognized in other jurisdictions, both state and federal. See Kiekow v. Village of Chenequa, 342 F.Supp. 494 (1972); Norton v. Blaylock, 285 F. Supp. 659 (1968); Williamson v. Wannamaker, 48 S.E.2d 601 (1948); Lane v. Hayes, 90 S.E.2d 270 (1955); contra, State v. Norby, 165 P.2d 302 (1946). Yet, the Arizona Supreme Court did not even reach such a question for its decision was based upon the specific authority granted the mayor

and council by Charter, ordinances and their rules and regulations.

The decision analyzed the propriety and validity of the mayor and council's rules and regulations adopted to govern its proceedings. Additionally, the Arizona Supreme Court reviewed its own prior decision relating to the judiciary's consideration of legislative bodies authority to immediately enact legislation through the use of emergency power. In so doing, the Arizona Supreme Court reexamined and affirmed its decision in City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951). It is clear that the decision of the Arizona Supreme Court rests firmly upon non-federal grounds which unquestionably sustain and support its judgment.

Although a separate federal question might hypothetically lie in this matter, the Arizona Supreme Court's decision

exists independently of any such issue. The decision never addressed a federal question.

The Appellees must further note that the decision of the Arizona Supreme Court is inherently valid and tenable. The provisions of the Tucson City Charter, and the ordinances thereto, invest in the mayor and council the authority to appoint and to remove certain officers, including city magistrates. Where there is a coexistence of the power to appoint and the subsequent power to remove at will, there can be no practical cessation of the executive's power over the office holder. Where the power to remove an office holder at will and without cause exists, there can be no vesting in the office holder of any property, contract or constitutional right to the office. This issue was the central issue in Marbury v. Madison, 1 C. 137, 2 L.Ed 60 (1803). As Chief Justice

Marshall expressed in Marbury (1 C. at 157):

> Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. [Emphasis added.]

Where the officer is, however, removable at the will of the executive, as herein, then Marshall stated (1 C. at 162):

> ...the circumstance which completes his appointment is of no concern, because the act is at any time revocable...

In this circumstance, the mayor and council had the clear authority to not only reconsider its decision but at any point subsequent to remove the appointee from office conditioned only upon the existence of sufficient votes to effect such removal. Therefore, the Arizona Supreme Court's decision is a clear, unequivocal interpretation of statutory provisions establishing authority and power in the mayor and council of the City of Tucson to have acted as they did, and the decision does

not reach or answer any federal question asserted by the Appellant.

III

THERE IS NO SUBSTANTIAL QUESTION OF FEDERAL LAW.

The Appellant contends that his cause of action frames a substantial question for the Court's consideration. The Appellant is not able, however, to reference that federal question within the judgment of the Arizona Supreme Court, nor in fact is there a substantial or significant question of federal law.

The Appellant urges that he was denied constitutional guarantees by the reconsideration of his appointment to the city court of the City of Tucson and further that the act of the mayor and council of the City of Tucson in repealing the resolution posing the appointment is repugnant to the Fourteenth Amendment of the

the Constitution of the United States. At the very best, the Appellant is arguing a question of form over substance, and the Arizona Supreme Court never addressed such issues.

In the first instance, the power and authority of the mayor and council of the City of Tucson are defined and established by the Tucson City Charter and the ordinances thereto. The Tucson City Charter and relevant ordinances invest in the mayor and council the power to appoint city magistrates, while also reserving the power to remove city magistrates without notice and without cause upon the mere condition that two-thirds of the council vote affirmatively for such action. Thus, clearly the appointing authority has also had reserved unto it the absolute authority to remove a city magistrate, without cause, without notice, at any time.

As was even noted in the dissenting opinion of the Arizona Supreme Court,

> Appellants argue that a Tucson city magistrate may be removed from office without cause and this is true.
> (Jurisdictional Statement, App. A at A-23)

Since removal without cause has been reserved to the city council, there could be no challenge whatsoever in relation to constitutional guarantees of due process if a magistrate was removed from office. Clearly then the argument that the appointing authority, who can also remove without cause, can not, however, reconsider an appointment prior to its effective date is specious.

The decision of the Arizona Supreme Court ruled that the rules and regulations promulgated by the mayor and council of the City of Tucson governing their proceedings provided for reconsideration on any act which had

not become effective, if such reconsideration was accomplished according to the procedures defined in the rules.

The mayor and council followed its rules and regulations in reconsidering the appointment of the Appellant and, therefore, there can be no substantial federal question before the Court existing by the claim that the action of reconsideration denied the Appellant his rights of due process. Merely alleging a federal question is insufficient to invoke the jurisdiction of the Court. There must be a real and substantial federal question. Equitable Life Assurance Co. v. Brown, 187 U.S. 308, 23 S.Ct. 123, 47 L.Ed 190 (1902).

It must also be noted that the entire matter is of narrow and limited importance relating only to the parties. In light of the reservation of power to remove at will in the council, a question

of reconsideration prior to the effective date of appointment creates a narrow question, the result of unique and clearly rare circumstances. If it were the circumstance that the rules and regulations governing the proceedings of the mayor and council had not provided for reconsideration of the resolution, the council still possessed the unquestioned power to remove the Appellant from the office, without notice and without cause. The extensive action by the mayor and council clearly emphasizes their change of attitude concerning the appointment of the Appellant, and thus without the power to reconsider, it seems clear the council simply would have removed the Appellant; or as they in fact did, pass a resolution repealing their former action.

A federal question, if it exists herein, is not substantial enough or broad enough, to merit or warrant the consideration of the Court. The Appellees urge that

any possible federal question existing in this matter is essentially devoid of all merit and frivolous and, therefore, cannot justify consideration by the Court. Seaboard Airline R.Y. v. Padgett, 236 U.S. 668, 36 S.Ct. 481, 59 L.Ed. 777 (1915). It is submitted that any issue herein is more form than substance and therefore cannot warrant review. Stewart v. Kansas City, 239 U.S. 14, 36 S.Ct. 15, 60 L.Ed. 120 (1915).

Due to such deficiencies, there exists cause for dismissal of the appeal. Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922); Palmer Oil Corp. v. Amerada Corp., 343 U.S. 390, 72 S.Ct. 11, 96 L.Ed. 47 (1951).

CONCLUSION

WHEREFORE, it is respectfully submitted that the Appellant, for the numerous reasons argued, has presented no viable basis for a decision of the Court, and that this matter should be dismissed or, in the alternative, the decision of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

CITY ATTORNEY'S OFFICE
CITY OF TUCSON

By Thomas J. Wilson
Thomas J. Wilson
Assistant City Attorney
Attorney for Appellees

CERTIFICATE OF SERVICE

I, THOMAS J. WILSON, one of the attorneys for the CITY OF TUCSON, et al., appellees herein, and an applicant for membership to the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of July, 1977, I served copies of the foregoing Motion to Dismiss or Affirm on the several parties thereto, as follows:

On the appellant, JOE JACOBSON, by hand delivering three (3) copies to his attorneys of record:

RICHARD J. DOWDALL
Johnson, Hayes & Dowdall, Ltd.
250 North Church Avenue
Tucson, Arizona 85701

CITY ATTORNEY'S OFFICE
City of Tucson

By Thomas J. Wilson
Thomas J. Wilson
Assistant City Attorney

APPENDIX A

Tucson City Charter
Chap. V, sec. 4

The city post auditor, city attorney, city clerk and city magistrate, hereinafter in this Charter designated "post auditor", "attorney", "clerk" and "magistrate", respectively shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appointment, unless sooner removed by the vote of two-thirds of the council voting affirmatively therefor.

APPENDIX B

Tucson City Charter
Chap. IX, sec. 8

All ordinances, resolutions or franchises shall be signed by the mayor and attested by the clerk, and transcribed in the proper books therefor, but no ordinance, resolution or franchise shall take effect and become operative until thirty days after its passage, except measures necessary for the immediate preservation of the peace, health or safety of the city; but no such emergency measure shall become immediately operative unless it shall state, in a separate section, the reasons why it is necessary that it should become immediately operative, and be approved by the affirmative vote of five-sixths of the council, taken by ayes and noes; provided, further, that all ordinances and resolutions having the effect of ordinances or required to be published, except emergency ordinances and resolutions, shall be published at least three consecutive times in the official newspaper of the city, and a copy thereof posted on a bulletin board in front of the City Hall, before they become effective and operative.

APPENDIX C

Rules and Regulations, Mayor and Council, City of Tucson, April 22, 1968, as amended July 14, 1968, and May 4, 1970, Division I, Reconsideration.

I. Reconsideration

1. When a motion has been made and carried or lost, it shall be in order for any member who voted with the prevailing side, on the same or succeeding meeting date to move for the reconsideration thereof.

2. A member on the prevailing side, on the same or succeeding meeting day, may file his intention to move for reconsideration on a given date.

3. The motion to reconsider is agreed to by majority of those voting, even when the vote reconsidered requires a greater vote for affirmative action. But a motion to reconsider, having been acted on, another motion to reconsider is not in order without unanimous consent.

4. No matter approving a contract may be reconsidered after execution of the contract, unless the party to the contract has not yet acted therein to his detriment.

APPENDIX D

Resolution 9503

ADOPTED BY THE
MAYOR AND COUNCIL

May 5, 1975

RESOLUTION NO. 9503

RELATING TO CITY MAGISTRATES; APPOINTING JEAN WILLIAMS A CITY MAGISTRATE; FIXING HER ANNUAL COMPENSATION.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That Jean Williams be and she hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing May 6, 1975, to and including May 5, 1977.

SECTION 2. Her salary shall be TWENTY-ONE THOUSAND FIVE HUNDRED and NO/100 Dollars ($21,500.00) per annum, together with cost of living increases and such additional benefits, such as longevity pay or insurance, as are generally granted regular City employees from time to time during said term.

SECTION 3. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson, Arizona, that this resolution become immediately effective, an emergency is hereby declared to exist, and this resolution shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, May 5, 1977.

/s/ L. C. Murphy
Mayor

ATTEST:

/s/ Donald L. DeMent
City Clerk

APPROVED AS TO FORM:

/s/ J. Webb
City Attorney

APPENDIX E

Ordinance 4665

Adopted JUN 06 1977
without emergency clause
To become effective
JUL 06 1977
In accordance with Ch. IX
Sec. 8 of Tucson City
Charter

ADOPTED BY THE
MAYOR AND COUNCIL

JUN 06 1977

ORDINANCE NO. 4665

RELATING TO CITY MAGISTRATES; APPOINTING WILLIAM W. BRASHEAR CITY MAGISTRATE; FIXING HIS ANNUAL COMPENSATION.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. That William W. Brashear be, and he hereby is, appointed a City Magistrate of the City of Tucson, Arizona, for the term commencing July 6, 1977, to and including July 5, 1979.

SECTION 2. His salary shall be TWENTY-THREE THOUSAND ($23,000.00) DOLLARS per annum, together with cost of living increases and such additional benefits, such as longevity pay or insurance, as are generally

granted regular City employees from time to time during said term.

~~SECTION 3. WHEREAS, it is necessary~~ for the preservation of the peace, health and safety of the City of Tucson, Arizona, that this ordinance become immediately effective, an emergency is hereby declared to exist, and this ordinance shall be effective immediately upon its passage and ~~adoption.~~

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, JUN 06 1977.

/s/ L. Murphy
MAYOR

ATTEST:

/s/ Donald L. DeMent
CITY CLERK

APPROVED AS TO FORM:

/s/ F. S. Dean
CITY ATTORNEY

NWL/cr
6-3-77

APPENDIX F

17A, A.R.S. Special Actions,
Rules of Procedure, rule 1(a)

Rule 1. Nature of the Special Action

(a) Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule. Special forms and proceedings for these writs are replaced by the special action provided by this Rule, and designation of the proceedings as certiorari, mandamus or prohibition is neither necessary nor proper. Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition.

APPENDIX G

Prayer for Relief, Appellant's Complaint, Superior Court, in and for the County of Pima, Arizona, June 23, 1975

WHEREFORE, your Petitioner prays the Court to enter an Order to Show Cause directed to the Respondents, ordering them to appear at a date and time certain to show cause, if any they have, why the Court should not enter the following Orders:

1. Its Order declaring Resolution #9502 to be null and void and of no legal effect in that it is repugnant to and in violation of the City Charter of the Respondent, CITY OF TUCSON, and a violation of due process of law, and

2. Its Order ordering the Respondents to expunge from the records of the Respondent, CITY OF TUCSON, Resolution #9502, and

3. Its Order of Finding of Fact and Conclusions of Law, pursuant to Rule 6 of the Rules of Procedure for Special Actions.

APPENDIX H

Arizona State Constitution
Article XIII, sec. 2

Section 2. Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the State, in the following manner:...

APPENDIX I

Tucson City Charter
Chap. V, sec. 2

The appointing officers of the city shall be:

(1) City manager;
(2) City finance director;
(3) City post auditor;
(4) City attorney;
(5) City magistrate;
(6) City engineer;
(7) Superintendent of the water department;
(8) Superintendent of streets;
(9) City clerk;
(10) Chief of police;
(11) Fire chief;
(12) Director of parks and recreation;
(13) Members of the library board;
(14) Members of the civil service commission; and
(15) Such other officers as from time to time may be provided for by ordinance.